

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Glasford Telephone Company</b>	:	
	:	
<b>Petition for Suspension or Modification</b>	:	
<b>of Section 251(b)(2) Requirements of the</b>	:	
<b>Federal Telecommunications Act</b>	:	<b>04-0193</b>
<b>Pursuant to Section 251(f)(2) of said Act;</b>	:	
<b>for entry of Interim Order; and for</b>	:	
<b>other necessary relief.</b>	:	
	:	

**BRIEF ON EXCEPTIONS OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

The Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Brief on Exceptions to the Administrative Law Judge's Proposed Order issued on July 28, 2004 ("Proposed Order").

Staff takes exception to the following findings and conclusions reached by the Administrative Law Judge ("ALJ") in the Proposed Order.

**EXCEPTION 1**

**The Proposed Order Appears to Have Required a Higher Standard of Proof Than Permissible.**

Staff takes exception to the Proposed Order to the extent it held Petitioner to a more exacting legal standard in evaluating its application than legally permissible. For example, in discussing Petitioner's estimated costs, the Proposed Order states that "the Commission is unfortunately without the benefit of a definitive costs analysis." Proposed Order at 13 (emphasis added). Also, in discussing the level of demand and Staff's analysis of expected costs and expected benefits, the Proposed Order states that "it is simply not possible to determine from the record with

sufficient certainty demand in Petitioner’s services area.” Id. at 15-16 (emphasis added). These statements appear to apply a standard of certainty rather than reasonableness. If so, the Proposed Order must be modified. The correct legal standard in this proceeding is a “preponderance of the evidence” standard. “Preponderance of the evidence” is “proof that leads the fact finder to find the existence of the issue in fact is more probable than not. In re T.W. v. C.W., 313 Ill.App.3d 890, 891-92 (2d Dist. 2000). Accordingly, to the extent the Proposed Order applied an incorrect legal standard, the evidence must be re-evaluated, the correct legal standard applied, and the Proposed Order revised to comport with the law.

Staff requests that the Administrative Law Judge include the correct legal standard at Page 3 of the Proposed Order as set forth in Staff’s Proposed Order attached herein.

## **EXCEPTION 2**

### **The Proposed Order Erred in Finding that Petitioner Failed to Meet Its Burden of Proof.**

Under the correct legal standard, the evidence demonstrates that Petitioner has met its burden of proof that it is entitled to a temporary suspension of the wireline-to-wireless local number portability (“LNP”) requirement. Staff has demonstrated that Petitioner has met its burden of proof in showing that a temporary suspension of the wireline-to-wireless requirement is warranted. Staff’s cost witness Robert F. Koch presented Staff Scenario 1, which eliminated certain of Petitioner’s estimated costs, thereby reducing Petitioner’s estimated LNP cost per subscriber. Staff Ex. 3.0 (Koch Direct), at 14-17, Sch. 3.1. Mr. Koch acknowledged the uncertainty with respect to cost recovery responsibility for transport and transit costs and, therefore, recommended Staff Scenario 1, which included transport and transit costs, as the most appropriate LNP cost estimate for purposes of this proceeding. Id. at 13-14. Mr. Koch testified, in his judgment, that it would be appropriate to consider transport and transit costs in estimating the cost impact on Petitioner’s

customers. Id. at 12. He testified that the most important reason for including transport and transit costs in Petitioner's LNP cost estimates was the uncertainty with respect to cost recovery. Id. at 13. Mr. Koch testified that the FCC has not determined whether Petitioner would be responsible for transport and transit costs; therefore, it would be reasonable for the Commission to assume that Petitioner would incur and be responsible for recovery of transport and transit costs from its customers. Id.

Staff's policy witness, Jeffrey H. Hoagg testified that Staff's Scenario 1's estimated cost figure (\$1.44) constituted a significant adverse economic impact on Petitioner's customers unless Petitioner is granted a temporary suspension of the wireline-to-wireless LNP requirement. Mr. Hoagg testified that expected demand for wireline-to-wireless LNP is very low. Staff Ex. 1.0 (Hoagg Direct), at 8. Mr. Hoagg testified that no precise formula exists to derive a determination of whether a suspension is warranted, but that the analysis requires a careful application of judgment on a case-by-case basis. Id. at 8-9. Mr. Hoagg testified in his opinion the analysis requires balancing the expected costs and expected benefits of wireline-to-wireless LNP to Petitioner's customers. Id. at 9-10.

Performing the balancing test, Mr. Hoagg testified that Petitioner's estimated monthly LNP cost is unduly high in view of the expected demand (and, hence, expected benefits). Id. at 9. Mr. Hoagg testified that the expected benefits are to a substantial degree a direct function of the expected demand for wireline-to-wireless LNP. Id. at 9-11. Given the very low expected demand, the expected benefits were similarly very low. Id. at 11-12. Mr. Hoagg testified that although a temporary suspension would defer some benefits to the future (or perhaps forego some benefits immediately), Petitioner's customers would likely realize positive net benefits because the current expected costs exceeded the expected benefits. Id. at 12. Accordingly, Mr. Hoagg determined that

a temporary suspension was warranted to avoid imposing a “significant adverse economic impact” on Petitioner’s customers. Id. at 8.

Finally, Mr. Hoagg testified that a temporary suspension was particularly appropriate given that Petitioner’s customers that did not take advantage of wireline-to-wireless LNP service and port their telephone service to wireless carriers would end up paying the bulk of the costs of wireline-to-wireless LNP. Id. at 13.

Staff witness Hoagg also determined that a temporary suspension was consistent with the public interest, convenience and necessity. Mr. Hoagg testified to various reasons, taken together, that supported a temporary suspension of the wireline-to-wireless LNP requirement. Staff Ex. 1.0 (Hoagg Direct), at 13-19. Mr. Hoagg testified that the available information regarding expected demand (and attendant the expected benefits) for wireless-to-wireline LNP is quite low. Id. at 14. He further testified that more complete and reliable information about demand for wireless-to-wireline LNP will become available over the next year or so from SBC, Verizon, and other carriers in Illinois, as well as other carriers throughout the nation. Id. In addition, Mr. Hoagg testified that the uncertainty of demand creates an asymmetry regarding the effect of the Commission’s decision on Petitioner’s customers. Id. at 15. Mr. Hoagg testified that the risk is greater in wrongly denying a temporary suspension because the expected costs likely outweigh the expected benefits at this time. Id. As a result, if Petitioner were denied a temporary suspension, Petitioner’s subscribers would begin immediately paying the costs of wireline-to-wireless LNP. Finally, Mr. Hoagg noted outstanding uncertainties regarding existing federal requirements and future FCC action that provided additional reasons bolstering his opinion that a temporary suspension was consistent with the public interest. Id. at 16-18. In sum, as described, Staff presented ample and persuasive evidence in this proceeding for the Commission to conclude that Petitioner has met its burden of

proof and to grant Petitioner a temporary suspension of the wireline-to-wireless LNP requirement.

Notwithstanding ample record evidence, the Proposed Order concluded that Petitioner failed to meet its burden to demonstrate that it was entitled to a temporary suspension. An important factor in the Proposed Order's decision seemed to be uncertainty regarding the level of demand for wireline-to-wireless LNP in Petitioner's service area. Proposed Order at 15. The Proposed Order indicated that "because the level of demand for wireline-to-wireless LNP is difficult to predict, it is difficult to evaluate the scope of the benefits." Proposed Order at 15. It therefore concluded that it was unable to determine from the record with "sufficient certainty" the level of demand and, as a result, was unable to conclude that the level of demand did not warrant implementing LNP. Id.

In Staff's view, the record is clear, and unrebutted Staff testimony established, that the current demand for wireline-to-wireless LNP is very low. Staff acknowledges, as the Proposed Order does, that a precise demand number cannot be pinpointed with "certainty," but one need not determine a precise demand number to conclude that the demand is nevertheless quite low. Staff witness Hoagg also testified that the expected benefit of the service is a function of the expected demand. Id. at 9-11. Thus, if, as the record evidence reveals, demand will be low, then the expected benefits will similarly be low. Mr. Hoagg testified that the expected costs presented in Staff Scenario 1 outweighed the expected benefits. Id. at 9. As a result, there is credible and persuasive evidence in the record to conclude that the demand (and, hence, the expected benefits) for wireline-to-wireless LNP in Petitioner's service territory is low enough to merit delay in implementing the requirement.

Staff's position is reinforced by the FCC's view regarding the level of demand sufficient to impose LNP obligations on carriers. In the Fourth Report and Order<sup>1</sup> concerning implementation of local number portability, the FCC delegated to state commissions the authority to require carriers operating within the top 100 MSAs to provide LNP regardless of whether such carriers received a specific request for LNP from another carrier. Id. ¶ 12. The FCC stated that state commissions could only impose such a requirement if they found "that LNP would serve the public interest because there is actual, meaningful consumer demand, as evidenced by consumer requests, for LNP in specified areas[.]" Id. at ¶ 13. The FCC explained, "there is little incentive for states to require LNP in areas where there is little or no consumer demand, and requiring LNP in such cases would be costly for the carriers, and, in turn, costly, for the consumers[.]" Id.

Here, the record evidence in this proceeding demonstrates that consumer demand for wireline-to-wireless LNP is very low. As a result, the lack of "actual, meaningful consumer demand" for LNP in Petitioner's service territory confirms that the expected benefits of implementing LNP are extremely low and are outweighed by the expected burdens. Thus, the lack of consumer demand shows that requiring Petitioner to implement LNP would impose a significant adverse economic impact upon Petitioner's customers and would not be consistent with the public interest, convenience, and necessity. Accordingly, the Proposed Order erred in not finding that the expected demand would be low. The Proposed Order further erred in failing to adopt Mr. Hoagg's conclusion that the expected costs outweighed the expected benefits of wireline-to-wireless LNP at this time.

---

<sup>1</sup> In re Matter of Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability, CC Docket Nos. 99-200, 96-98, 96-116, Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200, (rel. June 18, 2003) ("Fourth Order and Report").

As a result, Staff requests that the Administrative Law Judge modify the relevant paragraphs found at Pages 13-19 of the Proposed Order and replace them with the paragraphs set forth in Staff's Proposed Order attached herein.

### **EXCEPTION 3**

#### **The Proposed Order Drew an Arbitrary Cutoff Line at Approximately \$5 Based on Staff's Scenario 1.**

Further, the Proposed Order failed to provide a reasoned basis for distinguishing between those 2% carriers that obtained suspensions of the wireline-to-wireless LNP requirement and those 2% carriers that did not. Of the 33 requests for temporary suspensions by 2% carriers, only 4 carriers' requests were granted by the ALJ: Stelle Telephone Company, Grandview Mutual Telephone Company, Kinsman Mutual Telephone Company, and Leonore Mutual Telephone Company ("Leonore"). It appears the cutoff was approximately \$5 per subscriber per month based on Staff's Scenario 1.<sup>2</sup> For example, the Proposed Order in Docket No. 04-0259, granted Leonore a temporary suspension (Company estimate: \$8.96; Staff Scenario 1 estimate: \$5.74), but the Proposed Order in Docket No. 04-0189 denied a temporary suspension to Moultrie Independent Telephone Company ("Moultrie") (Company estimate \$4.74; Staff Scenario 1 estimate \$3.67). The Proposed Orders failed to provide a rational basis for granting Leonore a temporary suspension, but denying Moultrie one--other than drawing an arbitrary line at \$5. By drawing an arbitrary line at \$5, the Proposed Orders failed to consider the specific circumstances of each application and, therefore, failed to engage in rational decisionmaking.

---

<sup>2</sup> If, however, the determination was based on the companies' costs estimate, it appears the Proposed Order erred in denying Oneida Network Services, Inc's ("Oneida Network") request in Docket No. 04-0199. Oneida Network's cost estimate was \$8.37 per subscriber per month. If denial of Oneida Network's request was not in error, the Proposed Order's basis for decision is especially arbitrary. After Oneida Network's \$8.37 cost estimate, the companies' estimates drop off markedly, with Moultrie's \$4.74 per subscriber per month cost estimate as the next highest company.

By contrast, Staff provided a rational, case-by-case analysis and a reasonable policy basis for determining whether a temporary suspension was appropriate under the circumstances. In this case, Staff applied its analysis to Petitioner's circumstances and concluded that Petitioner's estimated costs of \$1.44 (as calculated in Staff Scenario 1) would constitute a significant adverse economic impact on Petitioner's customers. As discussed, Staff witness Hoagg balanced the expected costs and expected benefits of wireline-to-wireless LNP on Petitioner's customers and determined that based on the available evidence requiring Petitioner to deploy wireline-to-wireless LNP at this time would constitute a "significant adverse economic impact on users of telecommunications services generally" Staff Ex. 1.0 (Hoagg Direct), at 8-13. As a result, Staff recommended that Petitioner be granted a temporary suspension of the requirement. Id. at 13. Mr. Hoagg testified that available information suggested demand for LNP is likely to be very low. Id. at 12. Concomitantly, Mr. Hoagg testified that the expected benefits of LNP would be low. Id. at 12-13. Given this low expected demand and given the low expected benefits, Mr. Hoagg testified that the expected costs to Petitioner's customers outweighed the expected benefits to Petitioner's customers and, therefore, met the statutory criteria warranting a temporary suspension of the wireline-to-wireless requirement. Id. at 13. Mr. Hoagg noted a temporary suspension was particularly appropriate given that Petitioner's customers who chose not to port their telephone numbers (i.e., stay with Petitioner) to wireless carriers stood to pay the bulk of the LNP costs. Id. at 13. As the evidence reflects, Mr. Hoagg carefully applied his judgment and determined that Petitioner's estimated costs, as calculated in Staff Scenario 1, met the relevant statutory standard.

Accordingly, Staff requests that the Administrative Law Judge modify the relevant paragraphs found at Pages 13-19 of the Proposed Order and replace them with the paragraphs set forth in Staff's Proposed Order attached herein.



August 9, 2004

Respectfully submitted,

By: /s/

ERIC M. MADIAR  
THOMAS R. STANTON  
Illinois Commerce Commission  
160 North LaSalle St., Suite C-800  
Chicago, IL 60601  
(312) 793-2877

Staff Counsel